UNITED STATES - COUNTERVAILING DUTIES ON CERTAIN CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM GERMANY

(WT/DS213)

RESPONSES OF THE UNITED STATES OF AMERICA

TO THE QUESTIONS FROM THE PANEL FOLLOWING THE SECOND MEETING

April 2, 2002

Questions to Both Parties

41. Do you consider it impossible that the drafters might have intended there to be different rules for sunset reviews from those for investigations? In other words, in your view, would it have been irrational for the drafters to establish a set of disciplines in respect of investigations, and intend some of them apply to sunset reviews and others not? If so, what might be the reasons for such differences? If not, why not?

1. As the United States previously discussed in response to the Panel's first set of questions, applying the customary rules of interpretation of public international law to Article 21.3 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), the United States considers that no provisions of the SCM Agreement are required to be applied to reviews under Article 21.3 unless expressly indicated.[1] Where the drafters intended to require that the rules for sunset reviews and investigations be the same, they made an express provision to that effect.[2] As a result, it is both possible and rational that the drafters intended there to be different rules for sunset reviews and investigations.[3]

2. The reason for such differences is straightforward – investigations and sunset reviews serve different functions and, in essence, gauge different things. The purpose of an investigation is to determine whether the conditions necessary for the *imposition* of a countervailing duty currently exist; *i.e.*, injury caused by subsidized imports. The purpose of a sunset review is to determine whether the conditions necessary for *continued imposition* of a countervailing duty exist; *i.e.*, expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. The focus of a sunset review under Article 21.3 is likely future behavior if the remedial measure is removed, not whether or to what extent subsidization currently exists, which is the focus of an investigation.

42. Footnote 37 to the SCM Agreement states:

> *The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.*

Please comment on the meaning of this footnote in the context of the issues in this dispute.

3. Footnote 37 defines the term "initiated" as used initially in Article 10 in the context of investigations. Article 10 provides that countervailing duties "may only be imposed pursuant to investigations initiated" in accordance with the SCM Agreement. Footnote 37 defines "initiated" in this context to mean "procedural action by which a Member formally commences an

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[1] *Answers of the United States of America to Questions from the Panel* ("*US Answers*"), 21 February 2002, paras. 19-21.

[2] *Id.*, paras. 19 and 21, providing examples of provisions that apply to both investigations and sunset reviews.

[3] Of course, the United States is mindful that it is problematic to speculate on the intent of the drafters of treaty text and that the text itself is the best evidence of the drafters' intent.

investigation as provided in Article 11." The term "initiated" in Article 21.3 is used in a different context, one to which footnote 37 does not apply. "Initiated" in Article 21.3 cannot be a reference to an "investigation as provided in Article 11" because sunset reviews are not "an investigation as provided in Article 11", and Article 21.3 states that the administering authority, on its own initiative, may "initiate" a "review" to determine the likelihood of continuation or recurrence of subsidization and injury. Thus, the definition of "initiated" in footnote 37 is limited to those instances where it refers to a procedural action - an investigation - "as provided in Article 11."

43. What textual support, if any, is there, in your view, for the proposition that the term "investigation" includes sunset reviews? Please comment, in particular, on the relevance, if any, of footnote 37 to and Article 32.3 of the SCM Agreement.

4. There is no textual support in the SCM Agreement for the proposition that the term "investigation" includes Article 21.3 sunset reviews.

5. The SCM Agreement distinguishes between the investigatory phase and the review phase of a countervailing duty proceeding. Article 11 deals with investigations, while Article 21 deals with reviews. This structure is reflected in other provisions of the SCM Agreement. For example, Articles 22.1 through 22.6 set forth obligations concerning the contents of public notices issued during an investigation, while Article 22.7 sets forth comparable obligations with respect to reviews. As the panel in *Korea DRAMs* concluded, "the term 'investigation' means the investigative phase leading up to the final determination of the investigating authority."[4]

6. Article 32.3, which is a transition rule, also distinguishes between "investigations" and "reviews of existing measures." In *Brazil Desiccated Coconut*, the Appellate Body specifically recognized this distinction between the initial investigation and the post-investigation phase, noting that the imposition of "definitive" duties (an "order" in U.S. parlance) ends the investigative phase.[5]

7. As discussed in response to Question 42 above, footnote 37 defines the term "initiated" as used in the context of the commencement of an investigation under Article 11. Footnote 37 has no application to reviews under Article 21.

44. Please explain why, in your view, the drafters established a de minimis standard for investigations, providing support from the text and / or the negotiating history of the SCM Agreement. Do the mandatory nature and the strong language of the statement in Article 11.9

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[4] *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, Report of the Panel adopted 19 March 1999, para. 6.48, note 494.

[5] *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, Report of the Appellate Body adopted 20 March 1997, p. 9.

("There shall be immediate termination in cases where the amount of a subsidy is de minimis ...") indicate anything about the rationale for this standard?

8. As demonstrated in the United States' previous submissions in this case, an analysis of the text and context of Article 21.3 and the object and purpose of the SCM Agreement leads to the conclusion that the Article 11.9 *de minimis* standard does not apply to reviews under Article 21, including sunset reviews under Article 21.3. This should be the end of the analysis. However, the EC has brought up the negotiating history of the SCM Agreement in a vain attempt to overcome the conclusion to which the text, context, and object and purpose inexorably lead. Significantly, in its attempted reliance on negotiating history, the EC does not explain how its invocation of negotiating history is justified under the customary rule of treaty interpretation reflected in Article 32 of the *Vienna Convention*, which permits recourse to supplementary means of interpretation:

> in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
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> (a) leaves the meaning ambiguous or obscure; or
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> (b) leads to a result which is manifestly absurd or unreasonable.

9. Nothing in the SCM Agreement with respect to the Article 11.9 *de minimis* standard is ambiguous or obscure. Under Article 11.9, Members must apply a one percent *de minimis* standard in countervailing duty *investigations*. Nothing in Article 21.3 or elsewhere in the Agreement sets a *de minimis* standard for sunset reviews. Nothing in the Agreement requires Members to quantify an amount of subsidization when determining likelihood of continuation or recurrence of subsidization.

10. Furthermore, this absence of a *de minimis* standard or quantification requirement for sunset reviews does not lead to a manifestly absurd or unreasonable result. Determining likelihood of continuation or recurrence of subsidization requires a consideration of future, rather than present circumstances. What are the prospects of subsidization in the future? Without the discipline of the duty, is subsidization likely to continue or recur? The analysis required in a sunset review, therefore, is necessarily prospective and predictive in nature.

11. In the context of an investigation, the function of the Article 11.9 *de minimis* test is to determine whether foreign government subsidies warrant the imposition of a countervailing duty order in the first instance. For example, in an investigation, if the investigating authority found that a government program had provided recurring subsidies at a rate of more than one percent, imposition of a countervailing duty would be warranted if the subsidized imports were found to cause injury. In contrast, the focus of the sunset review is the future. The mere continued existence of this same program could warrant maintaining the duty beyond the five-year point,

even if the amount of the subsidy was currently *zero*, as stated in footnote 52, because subsidization and injury may be likely to recur absent the discipline of the duty. This distinction between the object and purpose of an investigation and the object and purpose of a sunset review supports the conclusion that, absent an express reference to the contrary, there is no basis to assume or infer an intent that the *de minimis* standard for investigations applies in sunset reviews.

12. Moreover, contrary to the EC's claim in its Second Oral Statement (para. 36), the negotiating history of the SCM Agreement reveals not one, but two theoretical justifications for the *de minimis* concept. The EC's claim is all the more astonishing given that the document it cites explicitly sets out both theories as follows:

> There are two alternative (and not mutually exclusive) theoretical justifications for the *de minimis* concept.
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> – The first view holds that countervailing duty actions and measures may be taken only when the trade distorting effect of the subsidy and its effects on the industry in the importing country so require. Thus, no action should be taken where it would be clearly out of proportion to the objective sought, or as Article 2:12 states, 'where the effect of the subsidy on the industry in the importing country is not such as to cause material injury'.
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> – *The second theory treats the issue of de minimis subsidy as a completely separate issue from the determination of injury in an investigation.* If it can be established that the totality of subsidies on the product investigated are minimal (so small per unit that they are practically non-existent), the investigating authorities may determine that, as Article 2:12 states, 'no subsidy exists'. Thus, as the maxim states, '*de minimis non curat lex*': the law does not take notice of minimal matters."[6]

In other words, one of the two plausible and recognized theories, which is similar to the justification under U.S. law for a *de minimis* standard, is unrelated to the subject of injury and merely considers that the law should not concern itself with subsidization that is of a trifling amount.

13. Thus, the only thing the negotiating history demonstrates is that there was *no* consensus or single reason why the drafters established a *de minimis* standard for investigations. Furthermore, under either theoretical justification for a *de minimis* standard, there is no magic or

[6] MTN.GNG/NG10/W/4 (28 April 1987), page 51 (emphasis added) (copy attached as Exhibit US-7). This document, prepared by the Secretariat, was a reference paper which reproduced existing GATT rules on countervailing measures and subsidies and which summarized the status of the discussions concerning possible modifications of those rules.

empirical economic logic in the choice of the one percent standard currently set forth in Article 11.9. Rather, the one percent standard is simply a negotiated number. The negotiating history itself reflects that the original proposal for the *de minimis* standard set the threshold at 2.5 percent.[7] The negotiators did not agree to include a *de minimis* standard in Article 21.3 for sunset reviews.

14. In addition, it is difficult to reconcile the EC's assertion that the *de minimis* standard relates to the question of whether there is injury when the SCM Agreement reflects not one, but three different, *de minimis* standards.[8] Furthermore, the *de minimis* standard in these provisions depends on the economic level of development *of the exporting country*. It is difficult to see how the injury in the importing Member from subsidized imports depends on the level of economic development in the exporting Member.

45. Assuming for the sake of argument, and without prejudice to the outcome in the matter before the Panel, that a de minimis standard applies in respect of subsidisation to sunset reviews, would this de minimis standard be based on: (i) the rate of subsidisation during the period of application of the countervailing duty ("CVD"); (ii) the rate of subsidisation at the time of sunset review; or (iii) the rate at which subsidisation is likely to continue or recur? How would you calculate that rate of subsidisation on which the de minimis standard would be based?

15. There is no obligation under the SCM Agreement to quantify an amount of subsidization in the context of a sunset review. All three of the options posited in this question demonstrate the error in suggesting that there is a requirement to do so. Indeed, just the fact that it is necessary to ask the question as to the relevant time period demonstrates that there was no agreement to include a *de minimis* standard - these are the types of questions that would have had to have been asked and negotiated at the time.

16. The consideration in a sunset review is whether subsidization and injury are likely to *continue or recur* in the absence of the duty. The rate of subsidization during the period of the application of the duty (option i), if above zero, would certainly demonstrate that subsidization continued with the discipline of the duty in effect and that, therefore, one could find a likelihood that subsidization would *continue* were the duty removed – for example, if benefits were being received under a recurring subsidy program or the benefit stream from a non-recurring subsidy would continue. The same logic would apply if the rate of subsidization at the time of the sunset review (option ii) also was above zero. Nevertheless, even if the rate of subsidization were zero

[7] *Id*. page 50 (Exhibit US-7).

[8] *See* SCM Agreement, Articles 11.9, 27.10(a), and 27.11.

under either of these options, one might find a likelihood of *recurrence* of subsidization[9] – for example, if subsidy programs, whether providing recurring or non-recurring benefits, originally found to benefit exporters still exist. With respect to the rate at which subsidization is likely to continue or recur (option iii), one could never *calculate* a future rate of subsidization for obvious reasons, although it may be possible to infer a future rate based on past rates (which is in essence what the U.S. Department of Commerce does under U.S. law).

17. In sum, all of these options might inform a determination of the likelihood of continuation or recurrence of subsidization – but they just as easily might not. The only obligation in a sunset review under Article 21.3 is to determine whether expiry of the duty would be likely to lead to the continuation or recurrence of subsidization and injury. This is an inherently predictive exercise which may call for a reliance upon findings made in the original investigation or subsequent administrative (assessment) reviews, if any. However, nothing in the SCM Agreement *requires* a consideration of the magnitude of subsidization in determining the likelihood of continuation or recurrence of subsidization and injury.

Questions to the EC

18. Consistent with the Panel's instructions, the United States intends to file comments on the EC's answers to questions 46-54 on Tuesday, April 9, 2002.

Questions to the United States

55. The European Communities states:

> *In fact, to the extent DOC relied upon the rates calculated in its original investigation, the duty of investigation laid down in Article 21.3 of the SCM Agreement would also require at a minimum that DOC made all documents showing how the rates were calculated in the original investigation also part of the record in the sunset review.*

Please respond to this argument.

19. There is no "duty of investigation" contained in Article 21.3, nor has the EC demonstrated that any such obligation exits. Article 21.3 requires that the administering authority "determine" whether the expiry of the duty would likely lead to a continuation or recurrence of subsidization and injury. The United States considers that an appropriate definition for the term "determine" as used in Article 21.3 is "to decide" something – namely, that the administering authority is required to decide the likelihood issue in the affirmative or

[9] *See US First Submission*, para. 81; *US Second Submission*, paras. 11-12 and 19; and *US Answers*, paras. 34-36.

terminate the duty.[10] This is the only obligation under Article 21.3. Nothing in the SCM Agreement *requires* consideration of the magnitude of subsidization in determining the likelihood of continuation or recurrence of subsidization and injury.

20. In conducting sunset reviews, the U.S. Department of Commerce determines whether the expiry of the duty would be likely to lead to the continuation or recurrence of subsidization and, if so, the level of that subsidization. The U.S. Department of Commerce's likelihood determination does not "rely" on any particular *level* of subsidization. The U.S. Department of Commerce does not *calculate* the level of subsidization in the context of the sunset review. Rather, as explained in the U.S. Department of Commerce's *Sunset Policy Bulletin* (Section III.B),[11] the U.S. Department of Commerce relies on rates previously calculated in the original investigation. These rates are contained in public, published determinations in the *Federal Register*. If the EC and the German producers believed that the data and documents underlying these public, published figures were germane to their arguments in the sunset review, they had ample opportunity to place such information on the sunset review record.

56. Could the United States point to the statutory or regulatory provisions, if any, of US law which provide an indication to interested Members and parties as to the parts of the record of a CVD investigation that would normally be expected to be made part of the record of the sunset review of any resulting CVD order. Please also point to any such provisions of US law in respect of the parts of the record of a duty assessment proceeding as well as the parts of the record of a review under Article 21.2 that would normally be expected to be made part of the record of the sunset review of the CVD order in question. Please provide the relevant statutory or regulatory texts, if any.

21. As the United States has explained previously,[12] under the U.S. system, a "proceeding" begins on the date of the filing of a petition and ends on, *inter alia*, the revocation of an order.[13] A countervailing duty proceeding consists of one or more "segments".[14] "Segment" refers to a portion of the proceeding that is separately judicially reviewable. For example, a countervailing duty investigation, an administrative review, or a sunset review each would constitute a segment of a proceeding.[15]

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[10] *See US Answers*, paras. 57-58.

[11] Exhibit EC-15.

[12] *US Answers*, paras. 69-70.

[13] 19 CFR 351.102 (definition of "proceeding"). A copy of section 351.102 and other regulatory provisions discussed herein is attached as Exhibit US-8.

[14] 19 CFR 351.102 (definition of "segment of proceeding") (Exhibit US-8).

[15] See 19 CFR 351.102 (definition of "segment of proceeding", examples under para. 2) (Exhibit US-8).

22. Under the U.S. statute and the U.S. Department of Commerce regulations, the administrative record from one segment of a proceeding never automatically becomes part of the administrative record of another segment of the proceeding. In other words, the administrative record from the investigation (one segment) or an administrative (duty assessment) review (another segment), never automatically become parts of the administrative record of a sunset review (yet another segment). Each segment of a proceeding contains its own discrete administrative record. Each final determination is based solely on the information placed upon and contained in the administrative record for that segment. Each final determination made in a particular segment, and the discrete record upon which it is based, is subject to judicial review.

57. The United States indicated, in response to an oral question from the Panel at the second meeting of the Panel, that the DOC's final determination in a CVD investigation is not made part of the record of the sunset review of any resulting CVD order, because that final determination is published and, therefore, publicly available. Is the Panel to understand, from this statement, that the DOC only makes part of the record of a sunset review information / documents which are not publicly available? If so, is the Panel to understand that the DOC may base its determination in a sunset review on publicly available information without making that information part of the record of the sunset review? Please explain in detail.

23. The administrative record of a sunset review (or any other segment of a proceeding) before the U.S. Department of Commerce consists of all factual information, written argument, or other material developed by, presented to, or obtained by the U.S. Department of Commerce during the course of the sunset review.[16] This record may include public as well as business proprietary information.[17] However, a relevant public, published decision, such as a prior U.S. Department of Commerce determination (*e.g.*, the final determination in the original investigation which is published in the *Federal Register*) or a decision from a U.S. court, need not be placed on the record to be considered by the U.S. Department of Commerce in making its determination. This is simply a generally accepted precept of U.S. administrative law.

58. The Panel notes the following comment in the Statement of Administrative Action accompanying the Uruguay Round Agreements Act:

> *[The DOC] normally will select . . . net countervailable subsidies determined in the original investigation or in a prior review.*

The Panel further notes that the United States indicated, in response to an oral question from the Panel at the second meeting of the Panel, that no information / documents from the record of a CVD investigation are automatically made part of the record of the sunset review of any

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[16] *See* 19 CFR 351.104 (record of proceedings) (Exhibit US-8).

[17] *Id*.

resulting CVD order. Is the Panel to understand, from this statement, that the DOC relies in a sunset review on the net countervailable subsidy determined in the original investigation, where there have been no prior reviews, without taking into account the information / documents underlying the calculation of such subsidy? If so, could the United States explain how the DOC does so. In particular, how does the DOC make any appropriate adjustments to the subsidy without reliance on such information / documents? Please explain in detail.

24. There is no obligation under the SCM Agreement to quantify an amount of subsidization in the context of a sunset review. Under U.S. law, however, the USITC has the discretion to consider the magnitude of the net countervailable subsidy that is likely to prevail if the order is invoked.[18] As reflected in the portion of the SAA quoted by the Panel, the U.S. Department of Commerce determines the likely magnitude in order to report it to the Commission.[19]

25. In determining the magnitude of the net countervailable subsidy, the U.S. Department of Commerce begins with the net countervailable subsidy rate determined in the investigation. As explained in prior U.S. submissions to the Panel, the U.S. Department of Commerce begins with this rate because it is the only evidence reflecting the behavior of the respondents without the discipline of countervailing measures in place. The U.S. Department of Commerce may make adjustments to the net countervailable subsidy in accordance with the guidance contained in the *Sunset Policy Bulletin*.[20] However, a sunset review is not a procedure for determining the amount of final countervailing duty liability. Instead, a sunset review is conducted to determine the likelihood of the continuation or recurrence of subsidization and injury in the event that the countervailing duty order is revoked. Consequently, the U.S. Department of Commerce does not *calculate* the net countervailable rate of subsidization in a sunset review. Rather, the U.S. Department of Commerce starts with the rate determined in the investigation and may adjust that rate by simple subtraction or addition – for example, if, since the investigation a program has been terminated without residual benefits, the U.S. Department of Commerce will subtract the rate determined for that particular program from the total rate determined for all programs. This is, in fact, what happened in this case. The mechanics of this kind of adjustment are set forth in Exhibit EC-8.

59. The Panel notes the following statement of the DOC in its final determination in the sunset review on carbon steel:

> *With respect to Dillinger's contention that the [DOC] should have included in the record of these sunset reviews the calculation memoranda the [DOC] prepared in the original investigation, we disagree. Insofar as Dillinger could have submitted*

[18] Section 752(a)(6) of the Act.

[19] Section 752(b)(3) of the Act.

[20] *See US Answers*, paras. 59-66.

> *some version of the memoranda in the sunset reviews, we determined that, in these sunset reviews, Dillinger did not file the information in a timely manner.*

Did the DOC communicate to Dillinger, or any other German producer, notably Hoesch, Preussag, or Thyssen, prior to publication of this final determination, the DOC's refusal to include in the record of these sunset reviews the calculation memoranda the DOC prepared in the original investigation and its reasons therefor? If so, please indicate when and provide a copy of this communication.

26. On April 13, 2000, the German producers in the sunset review – Thyssen Krupp Stahl AG, Stahlwerke Bremen GmbH, EKO Stahl GmbH, and Salzgitter AG – sought to have *all* the calculation memoranda from the original investigation placed on the record of the sunset review. Three German producers of certain corrosion-resistant carbon steel flat products were involved in the original investigation: Hoesch Stahl AG (Hoesch), Preussag Stahl AG (Preussag), and Thyssen Stahl AG (Thyssen). Prior to the issuance of the final determination in the sunset review, the U.S. Department of Commerce did not communicate to Dillinger (who was not a party in the corrosion-resistant case) or any other German producer that the request to have all calculation memoranda placed on the record of the sunset review was determined to be untimely submitted.

60. Does the DOC make the full record of a sunset review available to parties (including under administrative protective orders) prior to or after the publication of its preliminary determination? Is this a matter of law or policy? If the former, please point to the relevant statutory or regulatory provisions of US law, and provide the statutory or regulatory texts. Did the DOC make the full record of the sunset review on carbon steel available to parties? If so, when?

27. Under the U.S. statute and the U.S. Department of Commerce regulations, the public portion of the record of the sunset review, updated on a daily basis as information is placed on the record, is maintained in the U.S. Department of Commerce's Central Record Unit, which is open to the public during normal business hours.[21] Under the U.S. statute and the U.S. Department of Commerce regulations, the business proprietary portion of the record of the sunset review is available to any person covered by, and subject to, an Administrative Protective Order ("APO") for the sunset review segment of the proceeding.[22] All documents submitted by interested parties must be served on all other interested parties at the same time as they are filed with the U.S. Department of Commerce. This includes service of public documents on all parties

[21] *See* section 777(a)(4) of the Act. A copy of section 777(a)(4) and certain other provisions of the U.S. statute discussed herein is attached as Exhibit US-9. *See also* 19 CFR 351.103 and 351.104(b) (Exhibit US-8).

[22] *See* section 777(c)(1) of the Act (Exhibit US-9); 19 CFR 351.305 (Exhibit US-8).

and service of business proprietary documents on all parties under APO.[23] A copy of the proprietary portion of the record of the sunset review also is kept in the U.S. Department of Commerce's Central Records Unit.[24] The respondents in the sunset review on carbon steel had continuous access to the administrative record as it was continuously updated.

61. Please respond to paragraphs 34 and 46 of the European Communities' comments on the responses of the United States to the questions from the Panel following the first meeting of the Panel, regarding the use - as opposed to disclosure - by the DOC of confidential information / documents in sunset reviews.

28. In paragraph 34, the EC suggests that the U.S. Department of Commerce could have placed the proprietary calculation memoranda from the investigation on the record of the sunset review because, by making requests to place such data on the sunset review record, the German producers have "renounced the confidential nature of the data". There is no merit to the EC's argument.

29. Article 12.4 of the SCM Agreement provides that business confidential information "shall not be disclosed without specific permission of the party submitting it." In other words, before business confidential may be disclosed: 1) the party submitting it, 2) must have given specific permission. Notwithstanding the EC's assertions, neither of those factors is present in this case. Furthermore, on such an extremely serious matter as the protection of business proprietary information, it is irresponsible to suggest that an administering authority simply should *infer* that a particular party has given the requisite permission.

30. Consistent with Article 12.4, the U.S. statute provides that information submitted to the U.S. Department of Commerce "which is designated as proprietary by the person submitting the information shall not be disclosed to any person without the consent of the person submitting the information ... ."[25] The parties that submitted the business proprietary information in the original investigation were Hoesch Stahl AG, Preussag Stahl AG, and Thyssen Stahl AG. The German producers in the sunset review were Thyssen Krupp Stahl AG, Stahlwerke Bremen GmbH, EKO Stahl GmbH, and Salzgitter AG. In the record of the sunset review, there is no evidence of express consent to move the information from the record of one segment of the proceeding to another, nor is there any explicit claim that the parties in the sunset review had the authority to give such consent.

31. There is no distinction between "use" and "disclosure" on this issue. Any information used by the U.S. Department of Commerce as a basis for a determination is subject to disclosure.

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[23] *See* section 777(d) of the Act (Exhibit US-9); 19 CFR 351.303(f) (Exhibit US-8).

[24] *See* 19 CFR 351.103 and 351.104(a) (Exhibit US-8).

[25] Section 777(b)(1)(A) of the Act (Exhibit US-9).

If the information is public, it must be disclosed to the public; if the information is business proprietary, it must be disclosed to any party under APO. The concern is not, as the EC asserts in paragraph 46, that placing the business proprietary information from the investigation on the record of the sunset review might result in public disclosure. Business proprietary information remains proprietary unless and until the submitter explicitly indicates otherwise. Rather, the issue in this case is that the original submitter of the business proprietary information relied upon the fact that its proprietary information would only be used during the investigation phase and would be subject to disclosure only to parties under APO involved in the investigation phase for their use during that phase. The EC's suggested cavalier treatment of business proprietary information is not consistent with either U.S. law or Members' obligations under the SCM Agreement.